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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Telecommunications Services) CS Docket No. 95-184
Inside Wiring)
)
Customer Premises Equipment)
)

In the Matter of)
)
Implementation of the Cable)
Television Consumer Protection) MM Docket No. 92-260
and Competition Act of 1992:)
)
Cable Home Wiring)

Reply Comments of CableVision Communications, Inc.,
Classic Cable, Inc. and
Comcast Cable Communications, Inc.
on the Further Notice of Proposed Rulemaking

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Pursuant to 47 C.F.R. §§ 1.415, 1.419, CableVision Communications, Inc., Classic Cable, Inc. and Comcast Cable Communications, Inc.,¹ through their attorneys, file the following Reply Comments in the above-captioned proceeding.

I. Introduction

A review of the Comments filed demonstrates one fundamental point — adoption of the proposed rules will not enhance individual consumer choice. To the contrary, no one has refuted, and the evidence the Cable Operators have submitted, overwhelmingly demonstrates, that adoption of the proposed rules will merely enhance MDU owners status of gatekeepers² of a valuable service. The evidence presented by the Cable Operators is not simply based on its documented experiences — but is thoroughly supported by the words and actions of alternate providers and MDU owners and managers themselves.

Many of the Comments by alternate providers of multichannel services and MDU Owners³ in response to the Further Notice of Proposed Rulemaking (*Further Notice*) in this proceeding offer little or no evidentiary or documentary support for the

¹ Hereinafter, CableVision Communications, Inc. will be referred to as "CableVision," Classic Cable, Inc. will be referred to as "Classic," and Comcast Cable Communications, Inc. will be referred to as "Comcast". Collectively, the three commenters will be referred to as the "Cable Operators."

² Although the Cable Operators disagree with much of their Comments, they do agree with the Media Access Project and Consumer Federation of America that the proposed rules will make landlords gatekeepers.

³ Those Commenters include the Independent Cable & Telecommunications Association ("ICTA"), OpTel, Inc. ("OpTel"), GTE Services Corp. ("GTE"), the Wireless Cable Association International ("WCA"), the Building Owners and Managers Association, Institute of Real Estate Management, International Council of Shopping Centers, National Apartment Association, National Multi House Council and National Realty Committee (the "Apartment Association") (collectively the "Commenters").

assertions set forth in them. The absence of such evidence is telling and the Commission should view such comments skeptically.

The Cable Operators in this Reply will address the following issues:

1. Each of these Commenters continue to complain about and support the Commission's conclusion that "competitive providers are unable to place a second set of home run wiring in existing MDU buildings due to space limitations and aesthetic concerns," see, e.g., GTE at 3 and 12; OpTel at 3, without providing any support whatsoever for this conclusion.

2. Each of the Commenters claim that the FCC proposals will aid in competition and consumer choice but none even attempt to explain how that will occur. Moreover, GTE claims that "focusing exclusively on individual subscriber choice can hinder competition." GTE at 5 and 13. GTE seeks to shift the FCC's focus from increasing individual choice, to increasing MDU owners choices between competitive providers of video services. This is clearly not the goal Congress set for the Commission, nor within the scope of its statutory authority.

3. ICTA suggests that a bond be posted in an amount not less than \$25,000 by an incumbent electing to remove wiring. ICTA also recommends the adoption of a forfeiture provision for an incumbent that fails to honor its election as to disposition of wiring. However, other than speculation, no record support exists as to the need for bond requirements or forfeiture penalties.

4. Several of the Commenters ask the FCC to adopt a "fresh look" policy regarding long-term exclusive contracts between MDU Owners and cable operators. Such a request is disingenuous since the alternate providers themselves typically demand long-term exclusive contracts with MDU owners.

5. While the Commenters suggest that the time frame proposed in the *Further Notice* be shortened, several contend that the Commission's proposed rules governing disposition of home run wiring should continue to apply even if there is a question as to whether or not the incumbent has a contractual or statutory right to remain on the premises against the owner's wishes. Such an application of the rules will result in and actually encourage, more, rather than less, litigation, contrary to the hopes of the Commission.

II. The Complaints That Competitors Are Unable to Place a Second Set of Wires Within MDUs Due to Aesthetic and Space Concerns Have No Support in the Record and Are Misplaced

Each of these Commenters support the Commission's conclusion, and continue to complain themselves that "competitive providers are unable to place a second set of home run wiring in existing MDU buildings due to space limitations and aesthetic concerns."⁴ Yet, they provide no support whatsoever for this conclusion. It is interesting that OpTel avers that dual wires are not possible, yet the Cable Operators are aware of a condominium in Hollywood, Florida, in which OpTel and TCI of South Florida both maintain fully parallel distribution systems, including the home run wire, throughout the building to serve individual residents of the condominium. See also Cable Operators' Comments at 8. Consequently, at that MDU, residents truly have a competitive choice in multichannel video programming distributors ("MVPD").

Congress and the Commission dismissed concerns about aesthetics in providing for unrestricted use of Over-the-Air Reception Devices (CS Docket No. 96-83). The Commission found that certain regulations by cities or home owners' associations attempting to limit for aesthetic reasons the placement of satellite dishes, could impede the

⁴ See, e.g., GTE at 3 and 12; OpTel at 3, WCA at 4

use of such devices and thus were prohibited.⁵ Concern for individual consumer access to broadcast television, MMDS and DBS outweighed aesthetic concerns. The Commission also concluded that certain neighborhood associations' suggestion that its rules would "have a negative economic impact on the value of their land" had no merit because "[t]here is nothing in the record here to indicate that nullifying a homeowners' ability to prevent his neighbor from installing TVBS, MMDS or DBS antennas has a measurable impact on the homeowners' property, nor that it interferes with investment-backed expectations." *Id.* at ¶ 73.

The same logic would dictate that the Commission not allow unsupported claims of "aesthetic concerns" stand as an impediment to facilities-based competition and the installation of multiple wires in MDUs. Surely, aesthetics cannot be more of a factor with respect to a small cable that is placed inside a molding on walls⁶ than with respect to a large satellite dish that is placed in plain view. In short, an unsupported claim of impaired aesthetics should not override the clear public policy supporting individual consumer choice by requiring a dual wire world.

⁵ The FCC stated that "a regulation will be found to impair a viewer's ability to receive video programming signals if it unreasonably increases the cost of installation, maintenance or use of reception devices. Like procedural requirements, requirements to screen or to otherwise beautify an antenna may result in additional costs that discourage consumers from choosing particular antenna-based services." 11 FCC Rcd 19276 at ¶¶ 8-19.

⁶ With respect to the use of molding and conduit, GTE asserts that the FCC's proposal is appropriate because it would add much needed flexibility to ensure that existing conduit space is used efficiently. GTE at 16. However, just because a policy is flexible and efficient does not rescue that policy from being an unconstitutional taking of one's property.

III. Consumer Choice Will Not Be Increased as a Result of Implementation of these Proposed Rules

The *Further Notice* states that "Section 624(i) directs the Commission to prescribe rules regarding the disposition of wiring within a subscriber's premises in order to promote consumer choice and competition by permitting subscribers to avoid the disruption of having their home wiring removed upon voluntary termination and to subsequently utilize that wiring for an alternative service." FN at ¶ 56 (emphasis added). Within that Section of the *Further Notice*, the same phrase "promote consumer choice and competition" is used no less than ten (10) times to support the action that the FCC proposes. FN at ¶¶ 56-62. However, none of the Commenters have even tried to demonstrate how consumer choice will be increased by the FCC proposed rules with their proposed modifications. To the contrary, the Commenters desire for the MDU owner to remain the gatekeeper in order to allow it to choose only one provider of service to each MDU.

The Cable Operators, however, agree with certain comments by the Media Access Project and Consumer Federation of America, the Cable Telecommunications Association ("CATA"), and Cablevision Systems Corporation ("CSC") when they argue that the proposed rules make landlords the gatekeepers of multichannel video services, and as a result tenants living within MDUs and actually receiving and watching the service will have less choice. As argued extensively in the Cable Operators' Comment to the *Further Notice*, the real reason MDU owners and alternate providers do not want true consumer choice is money. MDU owners routinely seek cash payments and/or a percentage of revenues in consideration for long term — 15 to 20 year — exclusive contracts. Consequently, it is in both the MDU owners' and the alternative providers' financial interest

for the Commission to focus, as GTE desires, on competition among providers, rather than on consumer choice. That focus is beyond the Commission's statutory authority.

Attached to the Cable Operators' Comments were a sample of articles⁷ from industry, trade and business publications explaining this true motivation for the proposed rules. As one can readily understand after reading the articles, the owners and alternate providers have little interest in providing true consumer choice:

- **Journal of Property Management, January 11, 1997:** In an article entitled "Telecommunications invasion: defending your roles as gatekeeper", it is noted that "more managers and owners are finding it pays to be the keeper of that [cable, telephone and internet] gate." The article went on to state: "But if access laws are not an issue in your state, you could stand to gain something by arranging for cable service to your residents. 'In the past, the franchise cable operator took the subscriber as free fruit on a tree', says Heifner [president of Heifner Communications, Inc.]. Now they'll pay \$500 to 2,000 per subscriber to get access." Appendix at Tab 5.

- **Journal of Property Management, January 11, 1997:** At a November, 1996, convention of the Institute of Real Estate Management, several regional officers commented: "Technology will affect not only the way we do business, but also the profitability of our properties.... We have also seen several large telecommunications companies coming into California and offering to 'wire-up' buildings. Eventually, this may be a necessary amenity, but now it can be a source of revenue." Appendix at Tab 4.

- **Units, Serving the Multihousing Industry, September, 1996:** In an article entitled "the Search for the Holy Grail, a Quest for Cable Revenue", the author notes that where the existing contract for cable service expires, it "make[s] these properties bountiful candidates for finding new service providers offering tremendous revenue sharing contracts." Furthermore, on the pages of this article, the reader is exposed to two advertisements by alternate providers offering "New revenue stream," by Heifner Communications, and offering "Cable Revenue Sharing, Getting Your Share," by Intelli Cable. Appendix at Tab 10.

- **The Wall Street Journal, March 25, 1997:** In an article about increasing profits from apartment complexes, *The Wall Street Journal* concluded that "worried that future rent increases may become harder to get,

⁷ The articles were attached as an Appendix to the Cable Operators' Comments filed with the Commission on September 26, 1997, and are referred to as "Appendix at Tab

they constantly look for ways to raise rents.... Now, some property managers are being asked to sign up tenants for such revenue-boosting services as cable television, long-distance telephone and Internet service." Appendix at Tab 2.

- **Journal of Property Management , March 1, 1995:** In an article talking about new technology and services being provided by apartment owners and their sharing in the revenues from those services, John Gray, President of Summit Management, which manages 21,000 upscale apartments in the Mid-Atlantic, Midwest, and Southeast, says: "It could mean very significant profits for us, especially in upscale markets like ours where there is heavy telephone and cable television usage." Appendix at Tab 16.

- **Business Week, October 5, 1994:** In an article about MCI investing in private cable provider Interactive Cable Systems ("ICS"), it is stated that ICS is "providing telephone, cable and security services to MDU owners enabling them with powerful revenue and marketing tools...." Appendix at Tab 18.

As a result, providing choice to consumers within MDUs by allowing a second or even a third set of wires is not in the financial interest of either the MDU owner, who is obtaining a new and significant revenue stream, or the alternate provider, who is obtaining exclusive contracts and its competitor's assets at a bargain price. Thus, under the proposed FCC rules, the real loser is the one who Congress mandated should get more choice -- the consumer.

IV. There Is No Record Support for Financial Impositions, Such as the Posting of Bonds and Forfeiture Penalties

The ICTA, with support from other Commenters, suggests that a bond be posted in an amount of not less than \$25,000.00 by an incumbent who elects to remove wiring. ICTA at 6; Apartment Association at 4-5. In addition, ICTA suggests the adoption of a forfeiture provision for an incumbent that fails to honor its election as to the disposition of home wiring. ICTA at 9; WCA at 5-7. Other than speculation by these Commenters, the Cable Operators contend that there is absolutely no support whatsoever in the record for the adoption of either of these punitive financial burdens. No actual situations have been

presented that demonstrate that cable operators have damaged MDU properties without repair. The Cable Operators are unaware of this situation ever happening, let alone it becoming a recurring problem. The Commission should not be addressing hypothetical or imaginary problems, especially in such a punitive fashion.

With respect to the posting of a bond for removal of cable home wiring, the Cable Operators note that most, if not all, contracts with property owners that provide cable operators with access to premises, require cable operators to put the property back into the condition it was in prior to removal of its equipment. The bonding provision duplicates what is already contained in most cable access contracts. Thus, the goal of the posting of the bond has already been accomplished through open-market negotiations between MVPDs and property owners. Consequently, the Cable Operators assert that the FCC should not adopt regulations when they are not necessary.

V. *The FCC Should Not Adopt a "Fresh Look" Policy*

Many of the Commenters state that in order for competition to truly exist, the FCC must adopt a "fresh look" policy with respect to long-term exclusive contracts between cable operators and MDU owners. See, e.g., Apartment Association at 3; GTE at 8, n.15; WCA at 3. Such a request by these Commenters is nothing short of hypocritical. As the Cable Operators have adequately demonstrated, members of the ICTA and the WCA, including but not limited to OpTel and GTE, regularly and as part of their business plan, enter into long-term, exclusive contracts with MDU Owners.⁶ Consequently, the Commission must ignore such a request by these Commenters, unless a uniform rule is also applied to them.

⁶ The Cable Operators in their Comment filed on September 26, 1997 discussed several contracts between alternate providers and MDU owners whose terms called for a long term and exclusivity. See Comment at 6-7; Presentation at Tabs 1, 3 and 4.

VI. *An Automatic Stay Must Occur When an Incumbent is Required to Institute Legal Proceedings to Demonstrate that It Has an Enforceable Right to Remain on the Premises*

The Cable Operators have proposed that the rules or procedural mechanism to be implemented by the FCC should contain a provision that automatically stays these procedures should any of the parties seek judicial intervention for a determination as to whether the incumbent cable operator indeed has the legal right to remain on the premises against the will of the MDU owner. If the court determines that the cable operator has no such legal right, and after all appeals are exhausted, only then should the proposed time limits set forth in this rulemaking be activated. No cable operator should find itself in the situation of choosing between initiating litigation to protect its legal rights and waiving the rights it may have under the FCC Rules because litigation took longer than the time limits set forth in those Rules. It appears that the ICTA agrees with this proposal. ICTA at 3 ("In the absence of any actual enforcement action surrounding the access claim, the Commission's rules would have full force and effect.").

However, other Commenters, such as the WCA, argue that the Commission should clarify its Rules in order for the time limits to continue unless the incumbent obtains a legal determination of its rights before the notice period terminates. WCA at 8-10. While it would be difficult, if not impossible, to obtain a legal determination before such time limitations expired, WCA further asserts that the FCC should shorten these time frames for notice and election. Under the WCA's view, litigation, especially requests for temporary injunctive relief, would, by necessity, increase greatly in order for incumbents to preserve both their contractual and/or statutory rights to remain on the premises, and, at the same time, reserve their right to elect whether to sell, remove or abandon under the FCC rules. Such a result is contrary to the goal of reducing litigation desired by the

Commission. Consequently, an automatic stay provision will make these rules more effective and reduce litigation.

VII. The Cable Operators Agree with Two Proposals Put Forth by CATA and CSC

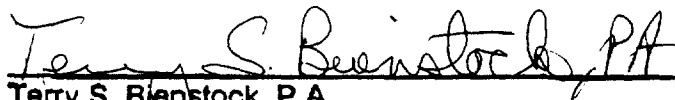
The Cable Operators note that if a default price should be established with respect to the sale of cable home wiring, they agree with CATA and CSC with respect to their proposal that the "default price should reflect the cost to replace inside wiring, which would be at least \$150 per unit passed." CATA at 11-14; CSC at 14.

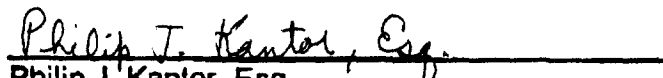
Additionally, the Cable Operators fully agree with CATA and CSC in their proposal that the FCC "make its proposed procedures unavailable where the landlord does in fact receive a premium from the new video provider." CATA at 15; CSC at 17-18.

VIII. Conclusion

CableVision, Classic and Comcast believe that the only way for the Commission to reach its goal of maximized consumer choice is to require only a unit-by-unit disposition without long-term, exclusive contracts. The Cable Operators urge the Commission to enact Rules that will aid, not hinder, consumer choice, and to avoid rules that will make the MDU Owner the gatekeeper of telecommunications services that allow it to maximize profits and minimize consumer choice.

Respectfully submitted,


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